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In the Supreme Court of the United States

OCTOBER TERM 1962

No. 330

CITIZENS UTILITIES COMPANY OF CALIFORNIA, a corporation,

Appellant,

v.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SACRAMENTO, AND CITY OF NORTH SACRAMENTO, a municipal corporation (Real Party in Interest),

Appellees.

Appeal from the Judgment of the District Court of Appeal, State of California, in and for the Third Appellate District.

Appellant's Petition for Rehearing

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Appeal from the Judgment of the District Court of Appeal, State of California, in and for the Third Appellate District.

Appellant's Petition for Rehearing

Appellant, CITIZENS UTILITIES COMPANY OF CALIFORNIA, respectfully petitions this Honorable Court under Rule 58 of its Revised Rules for rehearing of its Decision of November 5, 1962 ordering dismissal of this Appeal for "want of a substantial federal question".

The instant Appeal was filed for the purpose of securing review by this Court of the lawfulness of a decision of the

District Court of Appeal of California, Third Appellate District, denying Appellant's Petition for Writ of Review and/or Prohibition, wherein Appellant requested that honorable court to review the legality of an order of the Superior Court of Sacramento County denying Appellant's "Motion to Stay Execution of Judgment of Condemnation" in proceedings pending therein. The eminent domain action referred to was commenced by the City of North Sacramento, a municipal corporation (real party in interest herein), for the purpose of acquiring the public utility water system owned, operated and maintained by Appellant within and adjacent to the territorial boundaries of said City in Sacramento County. The subject motion was filed by Appellant in order to prevent the City from taking over physical possession of Appellant's utility system until it had at least secured payment of the full measure of "just compensation" to be determined due Appellant in the proceedings which were then pending before the California Public Utilities Commission and the Superior Court for the County of Sacramento in accordance with provisions of the California Public Utilities Code. (See "Statement as to Jurisdiction", pp. 6-13.)

In dismissing this Appeal, this Honorable Court has approved the taking of physical possession of Appellant's utility system upon deposit of only $2,206,000, a sum conceded by the City to constitute *only a portion* of the "just compensation" to be determined due (see Motion to Dismiss or Affirm, p. 6; Statement as to Jurisdiction, p. 10), and without requiring the City to deposit a single penny of security for payment of the *balance* of such "just compensation".

The rule long adhered to by this Court is that although "due process" does not require that a property owner

actually receive compensation in advance of being dispossessed from his property in an eminent domain proceeding, he must, *at the very least*, receive reasonable, certain and adequate assurance that if he surrenders possession in advance, payment of "just compensation" will not be unreasonably delayed after the amount of the same has been assessed.

Dohany v. Rogers (1930), 50 S.Ct. 299; 281 U.S. 362; 74 L.Ed. 904;

Hays v. Seattle (1920), 40 S.Ct. 125; 251 U.S. 233; 64 L.Ed. 243;

Crozier v. Fried. Krupp Aktiengesellschaft (1911), 32 S.Ct. 488; 224 U.S. 290; 56 L.Ed. 771;

Sweet v. Rechel (1895), 16 S.Ct. 43; 159 U.S. 380; 40 L.Ed. 138;

Cherokee Nation v. Southern Kansas R. Co. (1889), 10 S.Ct. 965; 135 U.S. 641; 34 L.Ed. 295.

The order of this Court dismissing this appeal has necessarily required Appellant to accept a judgment against the City as its only security that there will not be an unreasonable delay in the prompt payment of full "just compensation". We have assumed therefore that this Court premised its order of dismissal upon a determination that because the condemnor is a municipal corporation, a judgment for compensation against it will, by and of itself, afford sufficient protection to safeguard Appellant's constitutional rights as a property owner.

If we are correct in our assumption, we respectfully submit that this Court has overlooked its prior determinations that the possibility of obtaining a judgment against a condemnor is *not* sufficient security *per se* to safeguard the constitutional rights of a property owner that such a judg-

ment must be one whereunder the owner can "*certainly obtain* the amount of . . . compensation."

Sweet v. Rechel (1895), 159 U.S. 380; 40 L.Ed. 188, 197;

Williams v. Parker (1902), 188 U.S. 491; 47 L.Ed. 559;

Crozier v. Fried. Krupp. Aktiengesellschaft (1911), 224 U.S. 290; 56 L.Ed. 771, 776;

Hans v. Seattle (1920), 40 S.Ct. 125; 251 U.S. 233; 64 L.Ed. 243;

Joslin Mfg. Co. v. Providence (1922), 262 U.S. 668; 67 L.Ed. 1167;

Dohany v. Rogers (1930), 50 S.Ct. 269; 281 U.S. 362; 74 L.Ed. 904.

It is well settled that the right of an owner of condemned property to collect a judgment against *a private* condemnor is not an adequate provision for the payment of "just compensation" sufficient to dispense with requirement for deposit of security in advance of taking.

Nichols on Eminent Domain, Third Edition, Sec. 8.712.

Though this prohibition is not inflexibly applied to municipal condemnors, authority supports the conclusion that *the fact a condemnor is a municipal corporation is not in and of itself sufficient reason for dispensing with the requirement of the deposit of security in advance of a taking.* Thus the Supreme Court of New Hampshire observed in *Goodrich Falls Electric Co. v. Howard* (1934), 171 Atl. 761:

> "Taking before payment is valid if the unascertained payment is duly secured, but not otherwise. Hence the statute operates when the payment is thus secured, and not in cases where the security is insufficient. It applies to municipalities whose credit at the time of taking is

of such strength that security for payment is the equivalence of payment. It does not apply to them when they are deficient in such credit. *The circumstances of security are to be examined in each case in order to determine if they afford the owner the protection he is entitled to.*

"....

"... *The issue in each case is one of fact and degree and demands attention to other items of relevance besides the public character of the taker and its present solvency. They are not by themselves decisive.*" (Emphasis added.)

In *Lone Star Gas Co. v. City of Fort Worth*, (1936) 98 S.W. 2d 799, 804, the Texas court determined that a city could not condemn a gas distributing system because neither the general statutes of Texas nor the City Charter prescribed an appropriate method of procedure whereunder such property might be condemned. The general statutes contained a section which provided that after an award of compensation had been determined, the condemnor could take possession of the property sought by paying the amount of damages awarded or by depositing the same in court, and by further depositing (1) an amount equal to the award to be held pending ascertainment of additional damages, and (2) by filing a bond to secure payment of costs. The section exempted municipal corporations from doing more than paying the sum awarded in advance of possession regardless of whether or not such sum might represent adequate compensation. The court declared:

"Under this Article . . . the City of Fort Worth after paying the amount awarded by the Commissioners, whether great or small, could take possession of the gas system and business of plaintiff, alleged to be worth $20,000,000, and in the event it was ultimately

found that the cost to be paid plaintiff was in excess of the award of Commissioners, plaintiff would have no security therefor, and would have been deprived of its property in advance of compensation 'first made or secured by a deposit of money'. In addition, under this statute the City might take possession of the gas system, appropriate or otherwise use it for an indefinite time, and then return same with no security to plaintiff for payment of its damages by reason of depreciation, mismanagement, loss, forfeiture of leases, or otherwise, except the award made by the Commissioners, which might be wholly inadequate.

It is not necessary for us to hold that if a public utility's business and system be taken under these provisions, the constitutional safeguards would be violated, *although it appears very probably such would be true.*" (Emphasis added)

The provision of the Texas Constitution referred to in *Lone Star* decreed that property could not be taken except by the state unless, "compensation shall be first made, or secured by a deposit of money." *The requirement there for advance deposit is identical in effect with the rulings of this Court (see cases above, page 3) that security must precede a taking.* It is noteworthy that the Texas court felt that it was unconstitutional to relieve a municipal corporation from this requirement. It indicates an awareness that indulgence in the assumption that municipal credit is tantamount to a deposit of security is incorrect.

In this proceeding, by the sworn affidavit of the City's Manager Jack, the City has admitted that it was required to incur a bonded debt of two and a half million dollars before it could raise sufficient monies to pay the amount of "just compensation" fixed in the *original* Public Utilities Commission valuation proceedings. ("Statement as to Jurisdiction", pp. 8-9.) The City has conceded that it is looking

to the balance of its bond sale proceeds to pay any supplementary award of compensation. ("Motion to Dismiss or Affirm", p. 6.) While it would have this Court believe that those proceeds provide a sufficient fund from which to pay any such supplemental award, the City carefully avoided making such statement under oath to the lower court. Its counsel *argued* only that it had adequate funds to pay its own "estimate" thereof. Remarkably, the only basis for such estimate in evidence was a letter from the Staff of the California Public Utilities Commission which revealed that this so-called estimate was woefully inadequate. ("Appellant's Reply to Motion to Dismiss", p. 10.) In any event, the lower court refused to reconcile the dispute between the parties as to the amount of the supplemental award which might reasonably be anticipated.

We submit that under the circumstances of this case where (1) the Appellee has already admitted inability to pay even a portion of the total award of "just compensation" without the sale of bonds, and (2) where it has deliberately avoided verifying support for its *argument* that its bond proceeds will be sufficient to pay the complete award, a serious doubt is raised as to its financial standing and its ability to satisfy any judgment of "just compensation".

The City has attempted to belittle Appellant's objections by contending that if a deficit between its bond funds and the award occurs, it will exercise its tax powers to make up any deficiency. But a general law city, such as North Sacramento, does *not* have unlimited tax powers, as it would imply. (Government Code Section 43068.*) Nor can it be

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* "Unless a majority of the city electors voting at an election held for that purpose are in favor of it, *the annual property tax shall not exceed one dollar ($1) on each one hundred dollars ($100)*, exclusive of such tax as may be necessary to pay the costs of any pension plan for city employees adopted pursuant to Article 2, Chapter 2, of Division 5, exclusive of such tax, not to exceed five cents ($.05)

assumed that it can immediately make its tax power available for satisfaction of condemnation judgments to the exclusion of all its other prior existing municipal responsibilities.

We have heretofore called this Court's attention to the provisions of the California Government Code which authorize municipalities to stagger the payment of judgments over extended terms of as long as ten years. ("Statement as to Jurisdiction", pp. 15-16.) While the issue of the constitutionality of such sections as applied to the payment of a judgment arising in a condemnation proceeding appears not to have arisen heretofore, it is submitted that condemnation judgments cannot be subordinated, *either by option or direction*, to other judgment claims, nor treated merely on a parity with them. In invalidating a statute which effectually directed that condemnation judgments be so considered, the Illinois Supreme Court declared:

> "It must be remembered that a landowner whose property is taken or damaged for public use through the exercise of the power of eminent domain is an involuntary creditor who has no right to prevent the city from taking or damaging his property. To place him in the same class with a person who voluntarily became a creditor of the municipality, with knowledge of its financial condition, and then to deny him the right to payment until all prior judgment creditors had been paid or given a chance to be paid, is a denial of his right

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on each one hundred dollars ($100), as may be necessary to pay the costs of civil defense or disaster preparedness, exclusive of such tax as may be necessary to pay the costs of sewerage facilities, exclusive of such tax as may be necessary to pay the costs of park and recreation facilities and exclusive of such tax in addition to the annual tax levy for other municipal purposes authorized by Sections 20532 [contributions to State Retirement System], 37465 [Veterans Homes], 37558 [Museum Maintenance], and 43069 [Flood Control Works] of this code, Section 5304 of the Public Resources Code and Section 22241 of the Education Code." (Emphasis added.)

to just compensation. It is no answer to say that he is entitled to interest on his judgment until he is paid. His right to payment of the judgment itself cannot be thus circumscribed."

People ex rel Wanless v. Chicago (1941), 38 N.E.2d 743; 138 ALR 1298, 1303.

Appellant submits that the reasoning in *Wanless* demonstrates that the City of North Sacramento could not constitutionally invoke the staggered payment provisions referred to in order to pay the balance of a "just compensation" award herein, and that, of necessity, it must pay any judgment of "just compensation" promptly. However, the probability of the City's being able to promptly pay Appellant any balance due it, either through exercise of its tax power or from bond proceeds, is in light of the record herein, at the very least highly speculative.

For these reasons Appellant respectfully submits that this Court cannot properly indulge in any assumption that this condemning City is able to make prompt payment of any such judgment of compensation, and or that any such judgment entered against it will adequately safeguard the property rights of Appellant.

It is altogether proper and indeed necessary in order to protect an owner's rights that evidence be taken regarding the likelihood of prompt payment of compensation by a municipal condemnor.

(See *Dowdle v. Raney* (1941), 147 S.W. 2d 42.)

Appellant submits that in properly ruling on its Motion to Stay Execution, the Superior Court should have, first, determined *prima facie* the measure of additional just compensation likely to be awarded in the proceeding, and secondly, the probability that this municipal condemnor could pay the same. Its failure to do so should have been rectified

by the District Court of Appeal upon review following a granting of Appellant's Petition for Review and or Prohibition. Its order, here appealed, denying such petition indicates that it erroneously declined to correct the error of the lower court, and in doing so it also erred.

It is respectfully submitted that in view of the above this Honorable Court should grant this Petition for Rehearing and that following review it should order the Respondent District Court of Appeal to direct the Superior Court of Sacramento County to issue its appropriate orders requiring the City of North Sacramento to (a) return possession of Appellant's said water system to Appellant, (b) to render to Appellant an accounting of the profits derived by said City therefrom during the period it has been in possession thereof, and (c) requiring said City, in advance of reacquiring possession of such system, to post such security for the payment of the balance of "just compensation" as said lower court shall, after hearing, determine is reasonable.

Dated: November 29, 1962.

Respectfully submitted,

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San Francisco 4, California

Counsel for Appellant.

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CERTIFICATE OF COUNSEL

The undersigned, counsel for Appellant herein, does hereby certify that the Petition for Rehearing attached hereto is presented in good faith and not for the purpose of delay.

Dated this 29th day of November, 1962.

ALVIN H. PELAVIN
Counsel for Appellant

CERTIFICATE OF SERVICE

I, ALVIN H. PELAVIN, counsel for Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 29th day of November, 1962, I served copies of APPELLANT'S PETITION FOR REHEARING on the several parties thereto, as follows:

1. On the Superior Court of the State of California in and for the County of Sacramento, by mailing a copy thereof in a duly addressed and sealed envelope with postage prepaid thereon to C. C. La Rue, County Clerk of the County of Sacramento, Court House, Sacramento, California.

2. On the City of North Sacramento, real party in interest herein, by mailing a copy thereof to Raymond McClure, Esq., 500 Calvados Avenue, North Sacramento, California, and another copy thereof to Martin McDonough, Esq., 926 J Building, Sacramento 14, California, each in a duly addressed and sealed envelope with postage prepaid thereon.

Dated November 29, 1962.

ALVIN H. PELAVIN
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Attorney for Appellant